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Analyzing the Video Gameplay Copyright Battles Occurring through YouTube's Content ID System

George Blazeski

YouTube has been the epicenter for a plethora of developments in copyright law. The video game industry has been closely tied to recent copyright disputes on YouTube; however, as of the writing of this paper, none of these disputes have progressed into a court case. These disputes can affect large sums of money; Lucas Watson, Google's vice president of sales for YouTube, estimated a total of \$350 million in ad revenue in a six month period from 2012 into 2013.¹

Section I of this paper will detail two scenarios of alleged copyright infringement and claimed advertising revenue on YouTube. Section II will detail how video games work, and explain how YouTube channels' are compensated through advertising. Legal analysis will occur in Sections III and IV. Section III will discuss the law around copyright ownership and licensing. It will also detail how YouTube currently complies with the Digital Millennium Copyright Act with the YouTube Content ID system. Section IV will discuss the current status of copyright protection of video games and the merit of any fair use defenses the YouTube channel operators can employ. Section V will conclude with predictions of the resolution of possible legal claims and recommendations on how copyright laws and the Content ID

¹ See, Daniel Sparks, *Google Triples YouTube Ad Revenue, Thanks to Apple*, DAILYFINANCE.COM (June 11 2013), <http://www.dailyfinance.com/2013/06/11/google-triples-youtube-ad-revenue-thanks-to-apple/> (last visited December 2, 2013) (YouTube ads propel mind-boggling revenue growth).

system can be improved to better serve copyright owners, content consumers, and creators who wish to create new content based upon existing copyrighted work.

I) Description of the 2013 Youtube Copyright Disputes

A. Nintendo Claims Advertising Revenue from All “Let’s Play” Videos Utilizing Its Content

This paper will focus on two specific copyright disputes involving video game content on YouTube. The first occurred in the summer of 2013. Nintendo, one of the largest video game companies in the world, declared it would claim all revenue from videos on YouTube featuring content from Nintendo’s games.² This policy would encompass all games developed and produced by Nintendo, but not games developed by a third party for Nintendo’s video game console.³ Nintendo had signed on as a YouTube partner and registered its copyrighted content in February of 2013 so it could monitor how its content was shared.⁴ Any videos which did not already have advertising would have ads inserted into them at the beginning, end, or both.⁵ This announcement was met with fierce vocal opposition from owners of YouTube channels who hosted these videos and their fans.⁶ Two weeks later, Nintendo withdrew its claim while acknowledging the poor feedback it received from gamers.⁷

Nintendo is in a unique position as a company which develops, produces, and sells consoles for video games. Video game developers are software companies which program, design, and test video

² See, *Nintendo to profit from user videos posted to YouTube*, BBC.CO.UK/NEWS/TECHNOLOGY (May 16 2013), <http://www.bbc.co.uk/news/technology-22552756> (last visited December 2, 2013) (Nintendo will profit from videos uploaded by fans that feature its games, the company has confirmed.).

³ See, Eddie Makuch, *Nintendo claiming ad revenue for user-created YouTube videos*, GAMESPOT.COM (May 16, 2013), <http://www.gamespot.com/articles/nintendo-claiming-ad-revenue-for-user-created-youtube-videos/1100-6408458/> (last visited December 2, 2013) (“Nintendo is now claiming...”).

⁴ *Id.*

⁵ *Id.*, (“as part of our ongoing push...”).

⁶ See, *Nintendo to profit from user videos posted to YouTube*, *supra* note 2 (‘Audiovisual Experience’).

⁷ See, Andy Green, *Nintendo May Have Eased Off On Its Claims To ‘Let’s Play’ Ad Revenues*, NINTENDOLIFE.COM/NEWS (June 24 2013), http://www.nintendolife.com/news/2013/06/nintendo_may_have_eased_off_on_its_claims_to_lets_play_ad_revenues (last visited December 2, 2013) (“He said the ad earnings...”)

games.⁸ Video game publishers manufacture and market games for developers and typically finance the game's development.⁹ As of this writing, there are three major video game consoles for sale: Playstation 4, Wii U, and Xbox One. A video game console outputs a video signal to display a video game.¹⁰ The video signal is typically displayed on a television.¹¹ Nintendo's current console is the Wii U.¹²

Nintendo's primary targets in this dispute were "Let's Play" videos.¹³ The popular definition of a "Let's Play" video is "a recorded video of video game play including a commentary by the gamer."¹⁴ In the past couple of years, many YouTube channels have established themselves, such as LetsPlay¹⁵, Two Best Friends Play¹⁶, and ZackScottGames¹⁷, to name a few. This is no set format for a "Let's Play" video. Some have frequent edits and footage from outside the game.¹⁸ Some videos have constant commentary.¹⁹ Others feature almost no commentary from the gamer and simply display game footage.²⁰ Some gamers review the game as they play, but generally game reviews are concerned to be a separate category of videos.

⁸ See, *Video game developer*, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Video_game_developer (last visited December 2, 2013) (introductory section).

⁹ See, *Video game publisher*, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Video_game_publisher (last visited December 2, 2013) (introductory section).

¹⁰ See, *Video game console*, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Video_game_console (last visited December 2, 2013) (introductory section).

¹¹ *Id.*

¹² See generally, *Nintendo*, NINTENDO.COM <http://www.nintendo.com/wiiu> (last visited December 2, 2013).

¹³ See, *Nintendo to profit from user videos posted to YouTube*, *supra* note 2 (Nintendo will profit from videos uploaded by fans that feature its games, the company has confirmed.)

¹⁴ See, *Let's Play (video gaming)*, WIKIPEDIA.ORG [http://en.wikipedia.org/wiki/Let%27s_Play_\(video_gaming\)](http://en.wikipedia.org/wiki/Let%27s_Play_(video_gaming)) (last visited December 2, 2013) (introductory section).

¹⁵ See generally, *LetsPlay*, YOUTUBE.COM <http://www.youtube.com/user/LetsPlay> (last visited December 3, 2013).

¹⁶ See generally, *TheSw1tcher*, YOUTUBE.COM <http://www.youtube.com/user/TheSw1tcher> (last visited December 3, 2013).

¹⁷ See generally, *ZackScottGames*, YOUTUBE.COM <http://www.youtube.com/user/ZackScottGames> (last visited December 3, 2013).

¹⁸ See generally, *TheSw1tcher, Two Best Friends Play: Injustice*, YOUTUBE.COM (April 28, 2013), <http://www.youtube.com/watch?v=RbXFFU-Hc98> (last visited December 3, 2013).

¹⁹ *Id.*

²⁰ See generally, *Various For, Super Mario Bros. 3 (NES) Complete Walkthrough*, YOUTUBE.COM (January 15, 2013), <http://www.youtube.com/watch?v=61MNeKHnhe0> (last visited December 3, 2013).

B. Wild Game Studios Claims Infringement in TotalBiscuit's Video Review of the Game

Day One: Garry's Incident

The second dispute involved a video game review uploaded by TotalBiscuit, The Cynical Brit, of the game Day One: Garry's Incident, made by Wild Game Studios.²¹ TotalBiscuit regularly reviews independent (indie) games for the personal computer (PC).²² These indie games are developed outside of large studios and typically have low budgets.²³ While major retail games are sold for \$60 on video game consoles or computers, indie games typically are sold for \$20 or less.²⁴ TotalBiscuit prefers to review indie games in order to inform consumers of games they should buy which they may never have heard of before.²⁵ He also wishes to warn gamers to stay away from games which he feels will be a waste of money.²⁶ In TotalBiscuit's opinion, Day One: Garry's Incident fell in the latter category.²⁷

On October 19th, 2013, TotalBiscuit received a Digital Millennium Copyright Act (DMCA) takedown notice from YouTube and his video review of Day One: Garry's Incident was pulled.²⁸ Word quickly spread amongst the Internet community and gamers began to question Wild Games Studios'

²¹ See generally, Tom Butler, *Garry's Incident video by Total Biscuit removed, allegedly because "dev dislikes critique"*, PCGMEDIA.COM (October 20, 2013), <http://pcgmedia.com/garrys-incident-video-total-biscuit-removed-dev-dislikes-critique/> (last visited December 2, 2013).

²² See generally, TotalBiscuit, *The Cynical Brit*, YOUTUBE.COM <http://www.youtube.com/user/TotalHalibut/about> (last visited December 2, 2013).

²³ See, *Indie game*, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Indie_game (last visited December 2, 2013) (introductory section).

²⁴ See, Dylan Young, *Indie and Video Game Pricing: How Prices Matter*, VOICES.YAHOO.COM (February 11, 2013), <http://voices.yahoo.com/indie-video-game-pricing-prices-matter-12007126.html> (last visited December 2, 2013) (There are bucket loads of short...).

²⁵ See, TotalBiscuit, *This video is no longer available: The Day One Garry's Incident Incident*, YOUTUBE.COM (October 20, 2013), http://www.youtube.com/watch?v=QfgoDDh4kE0&feature=c4-overview&list=UUy1Ms_5qBTawC-k7PVjHXKQ (last visited December 3, 2013) (at 0:10).

²⁶ *Id.*

²⁷ *Id.*, at 0:21.

²⁸ See, *WTF is Day One: Garry's Incident? The video is no longer available due to a copyright claim by WildGamesStudio. That's one way to suppress criticism.*, REDDIT.COM (October 19, 2013), http://www.reddit.com/r/Cynicalbrit/comments/1otlnh/wtf_is_day_one_garrys_incident_the_video_is_no/ (last visited December 3, 2013) (top comment by josephgee).

decision on the game's community message board on Steam.²⁹ Steam is the most popular vehicle for selling computer games by direct download and hosts a message board for each respective game.³⁰ For indie games, negative publicity on Steam can be a death knell. In response to a user's question, "Is this game in the same situation as Warz, by that I mean is it unpolished and buggy and the developers are incompetent and try to hide negative comments?" the CEO of Wild Games Studios, Stephane Woods, posted, "We protected our copyright because Total Biscuit has no right to make advertising revenues with our license."³¹ TotalBiscuit crafted his own response in a YouTube video entitled "This video is no longer available: The Day One Garry's Incident Incident."³² This video was highly critical of the position taken by Wild Game Studios and in particular its CEO, Stephane Woods.³³ After enduring a flood of negative press, Wild Game Studios withdrew its copyright claim and restored TotalBiscuit's video on October 22nd, 2013.³⁴

II) Description of Video Games and YouTube Monetization

A. What is a Video Game?

Before diving into the inner workings of YouTube, it would be helpful to fully understand what a video game is. "A video game is an electronic game that involves human interaction with a user interface to generate visual feedback on a video device."³⁵ There are four main platforms for playing

²⁹ See generally, *Total Biscuit DID HIS JOB*, STEAMCOMMUNITY.COM (October 20, 2013), <http://steamcommunity.com/app/242800/discussions/0/810938810883523525/> (last visited December 2, 2013).

³⁰ See generally, *Valve Corporation*, STORE.STEAMPOWERED.COM <http://store.steampowered.com/> (last visited on December 3, 2013).

³¹ See, Stephane, *Same vein as Warz?*, STORE.STEAMPOWERED.COM (October 20, 2013, 8:19am), <http://steamcommunity.com/app/242800/discussions/0/810938810776322887/> (last visited on December 3, 2013) (responding to question posed by BigMeatSpecial).

³² See, TotalBiscuit, *supra* Note 25.

³³ *Id.*

³⁴ See generally, Luke Plunkett, *Developer Apologises To TotalBiscuit, Everyone After YouTube Stunt*, KOTAKU.COM (October 21, 2013), <http://kotaku.com/developer-apologises-to-totalbiscuit-everyone-after-yo-1449494563> (last visited December 2, 2013).

³⁵ See, *Video game*, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Video_games (last visited December 4, 2013). (introductory section).

video games: console, PC, mobile, and handheld. “The term “platform” refers to the specific combination of electronic components or computer hardware which, in conjunction with software, allows a video game to operate.”³⁶

“Console games are played by loading a game disk into a console, which is connected to the user's television. These systems generally consist of a hardware unit, or control desk, which operates game software stored on electronic memory devices that are housed in plastic game cartridges [or CDs and Blu-rays]. When the hardware unit is connected to a television set, and a cartridge [or disc] inserted into the hardware unit, the video game is displayed on the television screen and can be “played” via the hardware unit. The cartridges [or discs] generally contain only one game, and game console manufacturers engineer their game disks so that they will work only on their game consoles. PC games, on the other hand, are played by loading a game disk into the compact disk drive of a personal computer.”³⁷ PC games can also be directly downloaded from a retail or third-party website.³⁸ Mobile games are designed to be played on phones and tablets. At this time, they are smaller in scale than console or PC games and can be obtained from app stores overseen by companies like Apple, Google, and Amazon.³⁹ Handheld games are a subset of mobile games which are played on portable consoles whose primary function is play video games; these portable consoles are currently made by Nintendo and Sony, the 3DS and Vita, respectively.⁴⁰

B. How Does YouTube Monetize Content?

³⁶ See, *Video game*, *supra* Note 35 (Platforms).

³⁷ See, 7 A.L.R. Fed. 2d 269 (2005).

³⁸ See generally, **Valve Corporation**, *supra* Note 28.

³⁹ See, Mobile game, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Mobile_game (last visited December 3, 2013) (introductory section).

⁴⁰ See, Handheld game console, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Handheld_game_console (last visited December 3, 2013) (introductory section).

In both of the disputes previously discussed, the major point of contention is the proper monetization of videos, based on copyrighted content, uploaded to YouTube. Not every video is monetized; there is an application process before an uploader can begin receiving ad revenue.⁴¹ Before uploading a video, the owner must sign up for a YouTube account. Anyone who can sign up for a Google account can open a YouTube account. After the YouTube account is established, the uploader can choose to enable their account for monetization.⁴² In order to receive funds, the uploader must also associate an AdSense account with his or her YouTube account.⁴³ The uploader must then individually select uploaded videos for monetization.⁴⁴

Google has established criteria to determine which videos are eligible for monetization. First, a video must abide by YouTube's Terms of Services and Community Guidelines.⁴⁵ Second, the person uploading the video must own worldwide distribution rights to everything in the video.⁴⁶ YouTube will not disperse funds for any video which contains content used without the copyright owner's permission.⁴⁷ Such videos may also be removed from YouTube altogether.⁴⁸

Once a video is approved for monetization, the uploader will receive a percentage of the advertising revenue Google is paid by advertisers, typically increasing with the amount of views.⁴⁹ The types of advertising shown will change depending on many factors such as total video views, total

⁴¹ See generally, **Google, Monetization**, YOUTUBE.COM https://www.youtube.com/account_monetization?referrer=creator (last visited December 3, 2013) (can only be accessed if logged into a Google account).

⁴² Observe the requirements to view monetization pages in Note 41.

⁴³ *Id.*, (How can my videos make money?).

⁴⁴ *Id.*, generally.

⁴⁵ *Id.*, (What types of videos are eligible?).

⁴⁶ *Id.*

⁴⁷ *Id.*, (Which videos are NOT eligible?).

⁴⁸ *Id.*

⁴⁹ See generally, **Google, YouTube partner earnings review**, SUPPORT.GOOGLE.COM https://support.google.com/youtube/answer/72902?hl=en&ref_topic=12634 (last visited December 3, 2013).

subscribers to the YouTube channel, and the content of the video itself.⁵⁰ The most successful channels intake enough revenue for its owner(s) to work exclusively on uploading YouTube content.⁵¹ It is the prospect of these large sums of advertising revenue which prompt companies like Nintendo to investigate YouTube videos utilizing their content.

III) Copyright Statutes and the Content ID System

A. United States Copyright Statutes

As with any copyright dispute, two elements of a copyright infringement claim was be proven for a plaintiff to prevail. First, the copyright owner must demonstrate they do in fact have legal ownership of a copyright.⁵² Second, the copyright owner must prove the infringer either copied the copyrighted work or exercised the copyright owner's exclusive rights without the permission of the copyright owner.⁵³ In the two highlighted disputes, a brief analysis of United States copyright ownership laws is necessary to be able to assess the copyright interests involved and what recommended changes, if any, to the United States copyright system or YouTube's Content ID system will best serve the interests of copyright owners and the general public.

A work is created when it is fixed in a copy or phonorecord for the first time.⁵⁴ A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" if a fixation of the work is being made

⁵⁰ *Id.*, (What's my revenue share?).

⁵¹ See, Henry Hanks, *YouTubers' 'Please Subscribe' can earn them fame, money*, CNN.COM (October 21, 2013, 6:05pm), <http://www.cnn.com/2013/10/21/showbiz/youtube-famous-american-journey-irpt/> (last visited December 3, 2013) (Not only that...).

⁵² See, 7 A.L.R. Fed. 2d 269, *supra* Note 37

⁵³ *Id.*

⁵⁴ See, 17 U.S.C.A. § 101(2010).

simultaneously with its transmission.⁵⁵ All rights in a copyrighted work are vested in its creator, but they can be assigned to another through contract or license.⁵⁶ Video games are typically collaborative efforts between many programmers and the copyright of the final product is transferred to the company as a work for hire. A “work made for hire” is--

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.⁵⁷

It is undisputed that Nintendo owns the copyright in the video game content it developed and likewise Wild Game Studios owned the copyright to Day One: Garry’s Incident.

Copyright owners are entitled to certain rights concerning the copyrighted work. There are six rights defined by statute:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

⁵⁵ *Id.*

⁵⁶ *See*, 17 U.S.C.A. § 101, *supra* Note 54.

⁵⁷ *Id.*

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁵⁸

These rights can be licensed to others on an exclusive or non-exclusive basis. They do not need to be bundled together and can be licensed individually and to multiple people. If any of these rights are infringed upon by an unauthorized party, the copyright owner can sue the infringer(s) for copyright infringement in federal court. Federal copyright laws were last amended in 1998 with the passage of the DMCA.

B. The Digital Millennium Copyright Act

The DMCA extended copyright terms and provided a mechanism for online service providers to avoid liability for copyright infringement.⁵⁹ If copyrighted material is made available online without the copyright owner's authorization, the service provider must respond expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement.⁶⁰ The statute also detailed what a notification of claimed infringement should substantially entail:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

⁵⁸ See, 17 U.S.C.A. § 106 (2002).

⁵⁹ See generally, *Digital Millennium Copyright Act*, WIKIPEDIA.ORG <http://en.wikipedia.org/wiki/DMCA> (last visited December 3, 2013).

⁶⁰ See, 17 U.S.C.A. § 512(c)(2)(E) (2010).

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.⁶¹

Once this notification is received, the service provider will generally not be held liable to any person or claim based on the service provider's good faith effort to disable or remove the infringing material.⁶²

While this scheme already protects a provider such as YouTube, they take this requirement one step further with the Content ID System.

C. YouTube's Content ID System

YouTube created the Content ID program as part of its Copyright Center.⁶³ The Content ID system is a new technology developed by Google which identifies user-uploaded videos which are composed entirely, or partially, of copyrighted material.⁶⁴ Copyright owners can choose in advance what they want to happen when those videos are found.⁶⁵ They can claim the advertising revenue, get stats on them, or block them from YouTube altogether.⁶⁶ Rights holders deliver YouTube reference files (audio-only or video) of content they own, metadata describing that content, and policies on what they want YouTube to do when it finds a match.⁶⁷ YouTube will then automatically detect the copyrighted

⁶¹ See, 17 U.S.C.A. § 512 (c)(3)(A) (2010).

⁶² See, 17 U.S.C.A. § 512 (g)(1) (2010).

⁶³ See generally, **Google**, *How Content ID works*, SUPPORT.GOOGLE.COM <https://support.google.com/youtube/answer/2797370?hl=en> (last visited December 3, 2013).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

content and apply the selected policy.⁶⁸ It would seem Nintendo had been utilizing this program to keep tabs on “Lets Play” videos before it announced it would claim advertising revenue from those videos.

YouTube has created specific policies for video game and software content.⁶⁹ YouTube will only allow monetization of video game content if commercial rights were granted to the video creator via a license from the video game publisher.⁷⁰ The same policy applies to software user interfaces shown in videos.⁷¹ However YouTube will make an exception to this policy if use of the game footage or software interface is minimal.⁷² Videos which are associated by “step-by-step commentary is strictly tied to the live action being shown and provides instructional or educational value” will be allowed to be monetized as well.⁷³ This policy is similar to the doctrine of fair use, which will be discussed in the next section.

IV) Copyright Protections Applied to Video Games and Fair Use Defenses

A. How Are Video Games Protected Through Common Law?

Copyrights are granted to original expressions which are permanently fixed.⁷⁴ “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”⁷⁵ Video games are protected under United States copyright law as audiovisual works.⁷⁶ Due to the nature of the industry, almost every video game is a work made for hire where the copyright is ultimately owned by the video game developer and/or publisher. There is still a small subsection of

⁶⁸ See, **Google**, *supra* Note 63.

⁶⁹ See generally, **Google**, *Video game and software content*, SUPPORT.GOOGLE.COM <https://support.google.com/youtube/answer/138161?hl=en> (last visited December 3, 2013).

⁷⁰ *Id.*, (What can I monetize?).

⁷¹ *Id.*

⁷² *Id.*, (What can't I monetize?).

⁷³ *Id.*

⁷⁴ See, 17 U.S.C.A. § 102 (a) (2013).

⁷⁵ See, *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345, (1991).

⁷⁶ See, *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2nd Cir. 1982), (citing *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009 (7th Cir. 1983)).

games, usually indie games, which are created by a single programmer who would then retain the copyright in the game.⁷⁷

Typical audiovisual works are not manipulated by their viewers, but video games are meant to be directly influenced by the end user. This participation by the video game player does not prevent the video game from copyright eligibility as an audiovisual work.⁷⁸ At some point though, the audiovisual displays generated by a multi-player video game may come to resemble a real-time improvised performance created in part by the players, more than merely choosing one of the limited number of sequences the game allows them to choose.⁷⁹ A prime example is the Massive Multiplayer Online Role Playing Game (MMORPG). The computer code of a MMORPG can be viewed as a tool provided to the user, which he or she then uses to create a copyrightable work.⁸⁰ This theory is exactly that, theory, and has not been utilized yet in actual practice.

Courts' perceptions of video games have certainly changed over time. This excerpt from the Seventh Circuit is very illustrative of both the state of video gaming and the legal interpretation of video gaming in 1983:

Playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture. The player of a video game does not have control over the sequence of images that appears on the video game screen. He cannot create any sequence he wants out of the images stored on the game's circuit boards. The most he can do is choose one of the limited number of sequences the game allows him to choose. He is unlike a writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of the sentences stored in its memory, one of the paintings stored in its collection.⁸¹

⁷⁷ See generally, Dean Dodrill, *Elysian Tail*, NOOGY.COM <http://www.noogy.com/main.html> (last visited December 3, 2013).

⁷⁸ See, *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 856 (2nd Cir. 1982).

⁷⁹ See, Tyler T. Ochoa, *Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds*, 14 Vand. J. Ent. & Tech. L. 959, 968 (2012).

⁸⁰ *Id.*, at 975.

⁸¹ See, *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1012 (7th Cir. 1983).

Such a limited view of video gaming can rarely describe modern games accurately; today video games are not so limited in player choice. *The Elder Scrolls: Skyrim*, a single player roleplaying game available for Xbox 360, Playstation 3, and PC, infinitely generates quests to ensure the game never really ends.⁸² In some games, players can express their creativity in myriad ways through individual character design (including digital images), building design, music design or level/world design.⁸³ A prominent example is Sony's acclaimed series *LittleBigPlanet*, which boasted over one million user made levels back in 2009.⁸⁴ This is especially impressive since the game debuted in 2008.⁸⁵ These incredible advances in gaming technology could convince future courts to abandon the narrow view of video gaming found in cases like Midway.

While the video game itself is subject to copyright protection, so far courts have held playing a game does not create a copyright interest. The Ninth Circuit applied the statutory copyright definitions to the video game playing in a tournament setting and concluded that the playing of a game is not a "performance" within the meaning of the Copyright Act.⁸⁶ Part of the Court's justification was that "games are meant to be played."⁸⁷ It is the game developers who make the rules of engagement in each video game, but to the extent that those rules manifest themselves in player performance, the developer cannot claim them as original expression, so it follows players cannot as well.⁸⁸ Courts have

⁸² See, Jason Schreier, *Skyrim Will Have Infinite Quests, Director Says*, wired.com (November 9, 2011, 6:30am), <http://www.wired.com/gamelife/2011/11/skyrim-infinite-quests/> (last visited December 3, 2013) (You'll never have to stop...).

⁸³ See, W. Joss Nichols, *Painting Through Pixels: The Case for A Copyright in Videogame Play*, 30 Colum. J.L. & Arts 101, 117 (2007).

⁸⁴ See generally, Paulmichael Contreras, *LittleBigPlanet Sets Another Milestone for Number of Levels*, PLAYSTATIONLIFE.NET (November 20, 2009), <http://www.playstationlifestyle.net/2009/11/20/littlebigplanet-sets-another-milestone-for-number-of-levels/> (last visited December 3, 2013).

⁸⁵ See, *LittleBigPlanet*, WIKIPEDIA.ORG <http://en.wikipedia.org/wiki/LittleBigPlanet> (last visited December 3, 2013) (The series was launched in 2008...).

⁸⁶ See, *Allen v. Academic Games League of Am., Inc.*, 89 F.3d 614, 616 (9th Cir. 1996).

⁸⁷ *Id.*

⁸⁸ See, Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. Pa. L. Rev. 1535, 1568 (2013).

also highlighted the limited choices in the video games presented to them.⁸⁹ It is difficult to apply such logic to open-world style games such as the *Elder Scrolls* and *Grand Theft Auto* series where the choices available to the player seem limitless.⁹⁰ Creative gamers will find play games in ways that the game developers, or anyone else for that matter, could have anticipated.⁹¹ In fact, some of the most inventive players will manipulate a game in ways contradictory to what the developers intended or even imagined possible.⁹²

B. Theories Governing the Copyright Eligibility of “Let’s Play” Videos

It is possible to conceive of “Let’s Play” videos as joint works between game developers and players. A joint work exists when each of the putative co-authors must have made independently copyrightable contributions to the work and fully intended to be co-authors.⁹³ Obviously game developers intend for players to play their games, but it is not clear that this intention is a sufficient level of intent necessary to produce a joint work.⁹⁴ It can certainly be argued that a player's contribution to the game, even if copyrightable, could hardly exist without the game producer's contribution.⁹⁵ Thus if the game play is copyrightable, it must exist as a joint work. Because one joint owner cannot be liable for copyright infringement to another joint owner, since one cannot infringe his own copyright, it follows that a joint owner may, without the consent of the other joint owners, either exploit the work himself, or grant a nonexclusive license to third parties.⁹⁶ If they were joint authors, the players would have a duty to share licensing profits with each other and the game developers.⁹⁷ It is unlikely,

⁸⁹ *Id.*

⁹⁰ See, *Open World*, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Open_world (last visited December 4, 2013) (21st Century).

⁹¹ See, Dan L. Burk, *supra* Note 88.

⁹² *Id.* at 1548-49.

⁹³ See, *Childress v. Taylor*, 945 F.2d 500, 507-08 (2nd Cir. 1991).

⁹⁴ See, Dan L. Burk, *supra* Note 88, at 1549.

⁹⁵ See, W. Joss Nichols, *supra* Note 83, at 122.

⁹⁶ See, 1-6 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 6.10 [A] (2005).

⁹⁷ See, W. Joss Nichols, *supra* Note 83, at 122.

however, that either the game developer or a court would consider a division of copyright ownership that granted equal shares to all of the players and the game provider to be equitable, since joint authorship requires intent to work together.⁹⁸ Additionally, this situation would create a legal quagmire for determining the rights to the profits of “Let’s Play” videos since the videos themselves vary widely in creativity and would create a very undesirable situation.

As a precaution, many video game companies will try to protect their copyrights against this joint work theory. Computer games, including online games, typically include some type of adhesion contract which must be agreed to before installing a game. This contract purports to allocate to the game publisher any copyright or similar rights accruing to the player. For example, here is Blizzard’s end-user license agreement (EULA):

All title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard.⁹⁹

Sometimes these contracts appear as “clickwrap” when the game software client is loaded onto the player’s computer; in other cases they may appear as Terms of Service notices on the game publisher’s website. Wherever it appears, the contract attempts to nullify potential disputes over copyright ownership without allowing for a court appearance.¹⁰⁰ However, a court might hold a EULA invalid because it is unconscionable, because it otherwise violates public policy, or because it is preempted by federal copyright law.¹⁰¹ Regardless, if no intellectual property interests are generated, either because

⁹⁸ See, Tyler T. Ochoa, *supra* Note 79 at 980.

⁹⁹ See, e.g., **Activision Blizzard**, *World of Warcraft End User License Agreement*, US.BLIZZARD.COM (last updated August 22, 2012) http://us.blizzard.com/en-us/company/legal/wow_eula.html (last visited December 3, 2013).

¹⁰⁰ See, Dan L. Burk, *supra* Note 88 at 1544-45.

¹⁰¹ See, Tyler T. Ochoa, *supra* Note 79 at 965.

the player is not the initial owner or because game activity is not the subject matter of such rights, there may be no copyright concerns to quibble about.¹⁰²

Another view is game developers could be characterized as granting express or implied permission for players to alter or adapt their video game, resulting in a derivative work of the game.¹⁰³ If two or more authors collaborate on a work, the result is a joint work; but if after a work is created, another author lawfully creates a second work based upon the first work, then the second work is considered a derivative work, and the second author is the sole author of the derivative work, rather than being a joint author with the first author.¹⁰⁴ In order to be a legal derivative and not an infringement, the use of the original copyrighted work must fall under the fair use doctrine.¹⁰⁵ To determine if a derivative work was created under fair use, courts will analyze a work to see if it is a transformative use of the original copyrighted work.¹⁰⁶ Courts will ask if the material has been transformed by adding new expressions or meanings and if value was added to the original by creating new information.¹⁰⁷

There is another theory that video game players could own the copyright to their gameplay on their own. Video gameplay can be compared to the performance of baseball players, where a copyright interest has been established before.¹⁰⁸ The Seventh Circuit came to his conclusion when it considered a dispute between the Major League Baseball Players Association and the Major League Baseball clubs.¹⁰⁹ At issue were the broadcast rights to the players' performances during games.¹¹⁰ The court held "The many decisions that must be made during the broadcast of a baseball game concerning camera angles,

¹⁰² See, Dan L. Burk, *supra* Note 88 at 1545.

¹⁰³ *Id.*, at 1547.

¹⁰⁴ See, Tyler T. Ochoa, *supra* Note 79 at 981.

¹⁰⁵ See, 17 usc § 107 (2013) (introductory section).

¹⁰⁶ See, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579, (1994).

¹⁰⁷ *Id.*

¹⁰⁸ See, Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 665 (7th Cir. 1986).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

types of shots, the use of instant replays and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts.”¹¹¹ It is possible to view gameplay in the same light. Many games, but not all, grant the player complete control over camera angles and provide recording and playback options in game. If player choices about character actions are not sufficient alone for copyright eligibility, perhaps the addition of creative camera work will rise to the threshold of copyrightability.

Unfortunately for gamers, this holding is not accepted in all federal circuits. Although agreeing that sports broadcasts qualify for copyright, the *Motorola* opinion discounts the suggestion in *Baltimore Orioles* that constituent player performances meet the standards for copyright.¹¹² The court reasoned that athletic events are not “‘authored’ in any common sense of the word. Because practical rather than expressive considerations dictate player behavior, their actions fail copyright authorship.”¹¹³ The camera work, however, was clearly found to be copyrightable.¹¹⁴ If the logic of the Seventh Circuit is proper, then to the extent that a video game provides a sufficiently high degree of freedom of movement and camera control, the behavior of a gamer should be considered to be the sole product of the creative imagination of the user, rather than derivative of the copyrighted game which enables that movement.¹¹⁵ Gameplay becomes even less derivative if the gamer exploits bugs in the game coding; by definition, a bug or glitch in the game is an unintended result and cannot be part of a game developer’s intended expression.¹¹⁶

Following the holding of both courts that camerawork is eligible for copyright protection, “Let’s Play” videos provide a more compelling argument for copyright protection than gameplay on its own.

¹¹¹ See, *Baltimore Orioles*, *supra* Note 108 at 668.

¹¹² See generally, *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997).

¹¹³ *Id.*

¹¹⁴ *Id.*, at 847

¹¹⁵ See, Tyler T. Ochoa, *supra* Note 79, 982.

¹¹⁶ See, *Software bug*, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Software_bug (last visited December 3, 2013) (introductory section).

These videos often feature the creativity in shot selection, instant replays, and edits which justify finding copyright protection in the camera work of athletic events. As of now, the question of whether the standards for camerawork also apply to video game videos has yet to be addressed. It would seem to be analogous to the fair use analysis which will be conducted in the next section.

V) Analysis of the Disputes and Recommendations for the Future

A. Analysis of TotalBiscuit's Copyright Notice

After comparing the different theories surrounding the copyright eligibility of video game play, it becomes difficult to predict who would prevail if the YouTube disagreements proceeded to court. In my opinion, the most logical path is to determine whether the videos constitute a derivative work. I will turn to TotalBiscuit's situation first as it is easier to navigate.

Whether Wild Game Studios wanted to admit it or not, they had given permission to TotalBiscuit to monetize his review via license. TotalBiscuit requested the source code via email and provided examples of other videos he monetized.¹¹⁷ Wild Game Studios then provided the source code, creating an implied license to use the copyrighted game in his video review.¹¹⁸ But what if they hadn't? What if TotalBiscuit legally downloaded the game on his own and then made the review? The answer lies in the review video itself and whether there was new creativity and information added.

TotalBiscuit's review was a continuous video, about 21 minutes in length, of him playing through Day One: Garry's Incident.¹¹⁹ He went through the options menu, played through a bit of the game, and exposed a plethora of bugs, all while describing his opinion on the game and whether it should be

¹¹⁷ See, TotalBiscuit, *supra* Note 25 at 4:20.

¹¹⁸ *Id.*

¹¹⁹ See generally, TotalBiscuit, *WTF Is... : Day One: Garry's Incident ?*, YOUTUBE.COM (October 1, 2013), http://www.youtube.com/watch?v=KjTa_x3rbJE (last visited December 3, 2013).

purchased.¹²⁰ It did not seem apparent that he performed more than cursory video editing to put the video together; the video is one continuous clip featuring his instant impressions.¹²¹ TotalBiscuit's commentary is very humorous and certainly original. Furthermore, he also describes who might be interested in the game, the current landscape for similar games, and whether Day One: Garry's Incident is the worst game of the year.¹²² Had he done so in a magazine article or a book, there is no doubt his words would be eligible for copyright protection; there should be no difference here. His video should be considered as a derivative audiovisual work and therefore not infringing (again, implied license aside).

B. Analysis of "Let's Play" Videos and Nintendo's Claims

"Let's Play" videos are more difficult to analyze. Without a clear statutory or common law directive, each video must undergo a fact sensitive analysis. Some videos are silent (at least, on the gamer's part) playthroughs, simply showcasing one or two gamers playing through a game.¹²³ These videos cannot be considered to be derivative works as they add no transformative use to existing gameplay. Unless a court accepts an extension of the *Baltimore Orioles* logic, the gameplay itself does not qualify for copyright protection.

Most "Let's Play" videos do not fall in this category. Instead of silent gamers, the video creators add humorous commentary on the gameplay, each other, or topical subjects in pop culture.¹²⁴ Some videos have heavy editing¹²⁵, while others are one continuous take¹²⁶. Some videos feature games

¹²⁰ *Id.*

¹²¹ *See*, TotalBiscuit, *supra* Note 119.

¹²² *Id.*

¹²³ *See*, Various For, *supra* Note 20.

¹²⁴ *See*, TheSw1tcher, *supra* Note 18.

¹²⁵ *Id.*

¹²⁶ *See*, cobanermani456, *Let's Play of Sonic the Hedgehog 2006: Walkthrough Part 19*, YOUTUBE.COM (May 7, 2012) http://www.youtube.com/watch?v=3lpMlIGl5vE&list=TLKiTZgVlt96OlKzVy5a5Dgcm2LGg_1aWg (last visited December 3, 2013).

which were purchased at retail¹²⁷, while others featured downloaded titles which only offer a license of the game content.¹²⁸ Looking at Nintendo's situation, it is impossible to predict the course a lawsuit would have taken since there are so many differing "Let's Play" videos which feature Nintendo content. Perhaps it is one of the reasons why Nintendo dropped its request for YouTube to garnish all the advertising revenue.

C. Recommended Improvements to the Content ID System

The Content ID system itself is quite troublesome. While it certainly is a highly effective method for content owners to protect their works, it may be too prone to abuse. Despite the assertions of Stephane Woods, it seems very clear Wild Game Studios filed a copyright claim to censor TotalBiscuit. No one is certain if Nintendo conducted a copyright analysis before claiming the advertising revenue of "Let's Play" videos. Ultimately, your view of the situation boils down to the very philosophy of copyright: do they exist to promote the utility of works or to protect the natural rights of the author? If you are a supporter of natural rights, then likely you are comfortable with the false positives of the Content ID system. If you believe copyright exists to promote use of expressions, then these recent developments do not bode well for the future. Regardless of which philosophy, if any, is right, there are some adjustments Google can make to its system.

Currently there are no repercussions for abusing the Content ID system. The system will automatically scan a video upload against a database of files that were submitted to YouTube by copyright owners.¹²⁹ The specifics of a match are provided under the Copyright Notices section of the

¹²⁷ *Id.*

¹²⁸ See, sparkofflaim15, *Let's Play Magic 2013 Campaign Part 1 - Talrand!*, YOUTUBE.COM (June 20, 2012) http://www.youtube.com/watch?v=2zh_Jc3vXXc (last visited December 3, 2013).

¹²⁹ See, Google, *Content ID Claim Basics*, YOUTUBE.COM <https://www.youtube.com/yt/copyright/content-id-disputes.html> (last visited December 3, 2013) (introductory section).

video.¹³⁰ If the uploader wants to dispute a match, they fill out a short form which is reviewed by the owner of the alleged underlying copyright.¹³¹ Only if the copyright owner disagrees can the uploader then appeal to the owner again through YouTube.¹³² If the owner still disagrees at appeal, the video is removed and the uploader receives a copyright strike.¹³³ At this point the owner must submit a DMCA takedown notice, which may lead to legal action.¹³⁴

Accumulating multiple copyright strikes can be fatal to a YouTube account. Once a third strike is accumulated, all videos uploaded to the account will be removed and the account will be suspended.¹³⁵ The user of a suspended account is prohibited from making a new account.¹³⁶ A copyright strike will only expire after six months and only if the user does not receive any additional strikes and completes Google's copyright school.¹³⁷ Otherwise the user must ask the copyright owner to retract their infringement claim or the user must file a counter notification.¹³⁸ "A counter notification is a legal request for YouTube to reinstate a video that has been removed for alleged copyright infringement."¹³⁹ The counter notification must be submitted to the owner or his agent and consists of a webform provided by YouTube.¹⁴⁰ The webform includes the uploader's contact information, video URL, consent to the jurisdiction of the local Federal District Court (or YouTube's local Federal District Court if the uploader is located outside the United States), and a statement attesting to a good faith belief of non-

¹³⁰ *Id.*, (If your video was claimed by Content ID).

¹³¹ See, **Google**, *Appealing Rejected Content ID Disputes*, YOUTUBE.COM <https://support.google.com/youtube/answer/2770411?hl=en> (last visited December 3, 2013) (introductory section).

¹³² *Id.*

¹³³ See, **Google**, *supra* Note 129 (What happens when a rejected dispute is appealed?).

¹³⁴ *Id.*

¹³⁵ See, **Google**, *Copyright strike basics*, SUPPORT.GOOGLE.COM <https://support.google.com/youtube/answer/2814000?hl=en> (last visited December 3, 2013) (introductory section).

¹³⁶ *Id.*

¹³⁷ *Id.*, (How to resolve a copyright strike and restore your account's good standing).

¹³⁸ *Id.*

¹³⁹ See, **Google**, *Counter Notification Basics*, YOUTUBE.COM <https://www.youtube.com/yt/copyright/counter-notification.html> (last visited December 3, 2013).

¹⁴⁰ *Id.*, (To submit a counter notification, please use our webform.).

infringement.¹⁴¹ In this entire proceeding, there is no protection offered for the uploader on YouTube's part at all. Any relief would not come until a binding legal decision is made.

This needs to change. Incorporating penalties for bad faith use of the Content ID system can deter those who would harass uploaders. Mistakes can happen, so it serves no real purpose to punish those who report violations in good faith. Possible penalties for copyright owners operating in bad faith could include monetary fines payable to Google or to the harassed party, public apology, or suspension or expulsion from YouTube for the most egregious offenders. This penalty system may not stem the tide of aggressive copyright attorneys, but it should give YouTube uploaders some room to breathe.

Legal repercussions already exist for entities which issue DMCA takedown notices in bad faith. The DMCA requires a copyright owner to issue a statement of good faith belief of copyright infringement when it submits a takedown notice to a potential infringer.¹⁴² The Federal Northern District of California has permitted a claim to survive a motion to dismiss when it alleged Universal Music Studios submitted a DMCA takedown notice in bad faith.¹⁴³ In that case, Universal Music Studios, allegedly at Prince's request, sent a DMCA takedown notice to YouTube to remove a video of young children dancing in their kitchen to "Let's Go Crazy."¹⁴⁴ The court held Universal Music Studios should have taken fair use into consideration before issuing a DMCA takedown notice.¹⁴⁵ The court further opined the unnecessary removal of non-infringing material causes significant injury to the public where time-sensitive or controversial subjects are involved and the counter-notification remedy does not sufficiently address these harms.¹⁴⁶ The injury to the public may not be as significant when considering "Let's Play" videos, but nonetheless an injury does exist. Time will tell if the reasoning in *Lenz* will be

¹⁴¹ See generally, **Google**, *Counter Notification Requirements*, YOUTUBE.COM <https://www.youtube.com/yt/copyright/counter-notification-requirements.html> (last visited December 3, 2013).

¹⁴² See, 17 U.S.C.A. § 512(c)(3)(A)(v) (2010).

¹⁴³ See, *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

¹⁴⁴ *Id.*, at 1151-2.

¹⁴⁵ *Id.*, at 1156.

¹⁴⁶ *Id.*

adopted nationwide, but it is both logical and prudent for YouTube to incorporate bad faith provisions in its policies now to protect its video uploaders.

Regarding the common law gameplay copyright, resolution of the circuit split on the issue of player performance can bring clarity to the video game world. If the United States Supreme Court does not see fit to find a copyright interest in player performance, it will finally end that line of inquiry. On the other hand, firmly establishing player copyright can aid “Let’s Play” uploaders in protecting their own videos from infringement. Perhaps the court would go a third route and only find a cognizable interest in physical games like baseball and not extend the right to gaming. Either way, a uniform policy across the United States is needed as YouTube operates on an international scale and should not have to guess how conflicts would resolve in different jurisdictions.

Finally, YouTube’s video game policy needs amending. YouTube explicitly acknowledges that it does not determine what is a fair use and the determination is reserved for a court of law.¹⁴⁷ However, YouTube’s video game policy allows monetization for “Let’s Play” video where the commentary “strictly tied to the live action being shown and provides instructional or educational value.”¹⁴⁸ This is a very similar standard to transformative use. If YouTube is genuine about leaving fair use determinations to the judicial system, it should not predicate monetization on what is essentially a fair use standard. It is certainly prudent to provide guidelines based on a fair use framework, but if an uploader has no real recourse outside of the legal system, than YouTube should not act in a quasi-judicial capacity when it disclaims that a fair use determination can only be made in a court of law. The end result is a system which is entirely favorable to the whims of copyright owners. Until the legal landscape for “Let’s Play” videos and their brethren becomes clearer, YouTube should amend its policy to more permissive of monetization and allow for more flexibility with copyright strikes for channels utilizing video game

¹⁴⁷ See, **Google**, *supra* Note 131 (disclaimer at the bottom of the page).

¹⁴⁸ See, **Google**, *supra* Note 66 (What can’t I monetize?).

content. This field of law is still operating in shades of grey, but over the next few years there is tremendous potential for positive change for both content owners, video uploaders, and content consumers alike.